



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2011-0926; FRL-9763-4]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Permits for Major Stationary Sources and Major Modifications Locating in Prevention of Significant Deterioration Areas and Permits for Major Stationary Sources Locating in Nonattainment Areas or the Ozone Transport Region

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Virginia Department of Environmental Quality (VADEQ). These revisions allow the terms and conditions of various elements of the preconstruction program in Virginia to be combined into a single permit, establish limitations for issuance of Plantwide Applicability Limits (PALs), provide clarification to the exemption to Virginia's permitting rules regarding the use of alternate fuels and make minor administrative amendments. This action is being taken under the Clean Air Act (CAA).

DATES: This final rule is effective on [insert date 30 days from date of publication].

ADDRESSES: EPA has established a docket for this action under Docket ID Number **EPA-R03-OAR-2011-0926**. All documents in the docket are listed in the www.regulations.gov website. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are

available either electronically through www.regulations.gov or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Gerallyn Duke, (215) 814-2084, or by e-mail at duke.gerallyn@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On September 7, 2012 (77 FR 55168), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia. The NPR proposed approval of amendments to Virginia's Prevention of Significant Deterioration (PSD) and nonattainment New Source Review (NSR) programs to allow the terms and conditions of various elements of the preconstruction permit program in Virginia to be combined into a single permit, establish limitations for issuance of Plantwide Applicability Limits (PALs), and clarify exemptions to Virginia's permitting rules regarding the use of alternate fuels. The formal SIP revision was submitted by Virginia on September 27, 2010.

The SIP revision will allow preconstruction permits for major stationary sources to be combined into one permit with certain restrictions and conditions. Each action to combine permit terms and conditions must include a statement referencing the origin of each term or condition in the combined permit, its effective date and whether it is state and/or Federally enforceable. All terms and conditions of contributing permits must be included in the combined permit without

change, with certain exceptions, and the combined permit will supersede the contributing permit.

In addition, the SIP revision establishes state operating permits as the sole mechanism for issuing PAL permits. On December 31, 2002 (67 FR 80186), EPA published final rule changes to 40 CFR parts 51 and 52 regarding the CAA's PSD and nonattainment NSR programs that are collectively known as NSR Reform. These changes included provisions that would allow major stationary sources to comply with a PAL to avoid having a significant emissions increase that triggers the requirements of the major NSR program. The proposed SIP revision would limit establishing PALs to state operating permits and no longer allow PALs to be established through major or minor NSR permits.

In 2008, the Virginia General Assembly amended Va. Code Sec. 10.1322.4 to allow exemptions for alternative fuels and raw materials from permit requirements. The SIP revision updates and restructures the exemptions to ensure that there are no conflicts between the Virginia Code and Federal regulations, including the SIP.

II. Summary of SIP Revision

This SIP revision consists of revisions to the VADEQ regulations at 9VAC5 Chapter 80, Article 8 (Permits for Major Stationary Sources and Major Modifications Locating in Prevention of Significant Deterioration Areas) and Article 9 (Permits for Major Stationary Sources and Modifications Locating in Nonattainment Areas or the Ozone Transport Region). The following regulations under Article 8 are revised: 5-80-1615 (Definitions), 5-80-1625 (General), 5-80-1695 (Exemptions), 5-80-1925 (Changes to permits), 5-80-1935 (Administrative permit amendments), 5-80-1945 (Minor permit amendments), 5-80-1955 (Significant amendment procedures), and 5-80-1965 (Reopening for cause). Under Article 9, Regulations 5-80-2010 (Definitions), 5-80-

2020 (General), 5-80-2140 (Exemptions), 5-80-2200 (Changes to permits), 5-80-2210 (Administrative permit amendments), 5-80-2220 (Minor permit amendments), 5-80-2230 (Significant amendment procedures) and 5-80-2240 (Reopening for cause) are amended. Under Article 8, Regulation 5-80-1915 (Actions to combine permit terms and conditions) is added and under Article 9, Regulation 5-80-2195 (also called “Actions to combine permit terms and conditions”) is added.

EPA is approving Virginia’s SIP submission dated September 27, 2010 that consists of the following actions that pertain to Virginia’s PSD and nonattainment NSR Programs: (1) adding provisions to allow the terms and conditions of the various elements of the NSR Program to be combined into a single permit; (2) establishing state operating permits as the sole mechanism for issuing PALs; (3) clarifying certain exemptions from permitting for alternative fuels to ensure no conflict with federal law and regulation; and (4) making minor administrative amendments.

III. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) “privilege” for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia’s Voluntary

Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information “required by law,” including documents and information “required by Federal law to maintain program delegation, authorization or approval,” since Virginia must “enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. . . .” The opinion concludes that “[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.”

Virginia’s Immunity law, Va. Code Sec. 10.1-1199, provides that “[t]o the extent consistent with requirements imposed by Federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute

inapplicable to enforcement of any Federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.”

Therefore, EPA has determined that Virginia’s Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its PSD and nonattainment NSR programs consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

Other specific requirements of the regulations and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. No public comments were received on the NPR.

IV. Final Action

EPA is approving the September 27, 2010 SIP submission pertaining to Virginia’s PSD and nonattainment NSR programs.

V. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with

the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [Insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of

judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action regarding Virginia's PSD and NSR permit programs may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 10, 2012
Shawn M. Garvin,
Regional Administrator,
Region III.

40 CFR Part 52 is amended as follows:

PART 52 - APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for 40 CFR part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart VV—Virginia

2. In § 52.2420, the table in paragraph (c) is amended by:

- a. Revising the entries for Chapter 80, Sections 5-80-1615, 5-80-1625, and 5-80-1695.
- b. Adding an entry for Chapter 80, Section 5-80-1915, after the existing entry for 5-80-1865.
- c. Revising the entries for Chapter 80, Sections 5-80-1925, 5-80-1945, 5-80-1955, 5-80-1965, 5-80-2010, 5-80-2020, and 5-80-2140.
- d. Adding an entry for Chapter 80, Section 5-80-2195, after the existing entry for 5-80-2190.
- e. Revising the entries for Chapter 80, Sections 5-80-2200, 5-80-2210, 5-80-2220, 5-80-2230, and 5-80-2240.

The amendments read as follows:

§ 52.2420 Identification of plan.

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(c) * * *

EPA-Approved Virginia Regulations and Statutes

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * * *	* * *			
9 VAC 5, Chapter 80	Permits for Stationary Sources [Part VIII]			
* * * *	* * *			
Article 8	Permits -- Major Stationary Sources and Major Modifications Located in Prevention of Significant Deterioration Areas			

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * * *	* * *			
5-80- 1615	Definitions	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised 2 terms
5-80- 1625	General	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised
* * * *	* * * *			
5-80-1695	Exemptions	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised
* * * *	* * * *			
5-80-1915	Actions to combine permit terms and conditions	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	New
5-80-1925	Actions to change permits	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised
* * * *	* * * *			
5-80-1945	Minor permit amendments	7/23/09	[Insert <u>Federal Register</u>	Revised

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
			publication date] [Insert page number where the document begins]	
5-80-1955	Significant amendment procedures	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised
5-80-1965	Reopening for cause	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised
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Article 9	Permits -- Major Stationary Sources and Major Modifications Located in Nonattainment Areas or the Ozone Transport Region			
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5-80-2010	Definitions	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised 2 terms
5-80-2020	General	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised
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5-80-2140	Exemptions	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number	Revised

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
			where the document begins]	
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5-80-2195	Actions to combine permit terms and conditions	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	New
5-80-2200	Actions to change permits	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised
5-80-2210	Administrative permit amendments	7/23/09	Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised
5-80-2220	Minor permit amendments	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised
5-80-2230	Significant amendment procedures	7/23/09	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised
5-80-2240	Reopening for cause	7/23/09	[Insert <u>Federal Register</u> publication	Revised

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
			date] [Insert page number where the document begins]	
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[FR Doc. 2012-30585 Filed 12/19/2012 at 8:45 am; Publication Date: 12/20/2012]